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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

No. 70-5082

LAVERNE CARTER, et al.,
Appellants,

v.

WAYNE STANTON, et al.,
Appellees.

Appeal From The United States District Court For The Southern District of Indiana

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BRIEF FOR APPELLEE WILLIAM STERRETT

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction of an appeal from a three judge panel which has dissolved itself as improperly convened for want of a substantial federal question, even if, in fact, a substantial federal question was presented.

2. In the alternative, whether a substantial federal question was presented.

3. In the alternative, whether the lower court properly ordered the cause dismissed for a failure of the Applicants to exhaust their state administrative remedies.

STATEMENT OF THE CASE

Appellants, hereafter referred to as Applicants, initiated an action challenging the Indiana continued absence Regulation as inconsistent with the Social Security Act and as violative of the Fourth and Fourteenth Amendments to the Constitution of the United States. Applicants claimed that the Indiana "continued absence" Regulation, hereafter referred to as the Regulation, Reg. 2-402(b), Burns Rules and Regulations (52-1001)-2, violated the Constitution on its face and as administered by the Indiana Welfare Department.

Applicants alleged that the welfare department administered the Regulation by categorically denying assistance to all who had been separated from their spouses for less than six months unless they filed for divorce or legal separation.

A three judge panel was convened. The appellee in whose behalf this brief is presented, the Indiana State Department of Public Welfare, hereafter referred to as the SDPW, moved to dismiss for a want of jurisdiction. (A. 19). In order to resolve the matter, the lower court conducted a preliminary hearing in which it received evidence. (A. 211).

Evidence adduced at the evidentiary hearing disclosed that the Regulation is a guideline to assist in administratively determining whether the absence of a parent is

actual and bona fide. Applications for assistance are received from everyone presenting themselves at the County Department. (A. 50, 64, 176, 189, 191). There is a statewide policy of monetary need applied to everyone who applies. (A. 49, 58-59, 175). The standard of need applied to an applicant is the same whether the applicant has been separated from her husband for less than six months or for more than six months. (A. 51, 192, 195). The six month period designated by the Regulation is a guideline only. The six month requirement is regularly waived. (A. 51-53, 55, 176, 187, 192). For instance, Ernest McGruder, a supervisor for the Marion County Welfare Department (A. 47) testified that he had never refused AFDC assistance solely because the parents had been separated for less than six months, if the separation was actual and bona fide. (A. 65). A separation was actual and bona fide if it appeared that the parents would not be reconciled in the near future. (A. 66).

Filing for divorce or a legal separation is not a condition precedent to applying for, or actually receiving, welfare assistance, even though the applicant has been separated for less than six months from her husband. (A. 50, 177, 187, 192). The question in these cases is always one of financial need. (A. 64, 198). Welfare assistance is regularly obtained even though the recipient has filed for no divorce, no separation and has been separated from her husband for less than six months. Whether an applicant has filed for a divorce or a legal separation is only one of many factors bearing on the issue of whether the absence of the departed parent is actual and bona fide. (A. 176-177, 180-182).

Denying the right to make an application, denial of an application and the amount of assistance actually granted

are all appealable decisions in the Indiana statutory scheme. Decisions of the County Department of Public Welfare are appealable to the SDPW and decisions of the SDPW are appealable to the State Board of Public Welfare. In all instances, whatever the decision of the County Department of Public Welfare, the applicant is notified verbally and in writing of her right to appeal the county decision. (A. 193). An appeal may be readily obtained by no more than a telephone call. (A. 52).

In light of the evidence received at the evidentiary hearing conducted by the district court on November 24, 1970, it found that:

> "Under Indiana Law each claimant is provided with a right to appeal any decision made by the case workers or supervisors at the county level, whether it be a denial of the right to file an application, or dissatifaction with the amount of the grant. The appeal procedures provide a right to have the decision reviewed by the State Department of Public Welfare and if still dissatisfied with the decision, a second appeal may be had to the State Board of Public Welfare. None of the plaintiffs testified that they appealed the county decision. Only one of the witnesses, Toni Davis, testified that she appealed to the State Department of Public Welfare, but not to the State Board of Public Welfare. Defendant Stanton, Director of the County Department of Public Welfare, testified the file does not record any appeal taken by any of the plaintiffs." (A. 211-212).

Consequently, the district court concluded that the Applicants had wholly failed to exhaust the state administrative remedies available to them. (A. 212). Furthermore, in light of the pleadings and the evidence received, the district court concluded that the Applicants had not presented a substantial federal question and effectively dissolved itself

for want of federal jurisdiction, when it ordered the case dismissed. (A. 212).

SUMMARY OF ARGUMENT

To date, the participants in this appeal have ignored the significance of the three judge district court's dismissal for want of federal jurisdiction. When the three judge panel found that the constitutional questions raised by the Applicants were insubstantial and dismissed for want of jurisdiction, the three judge panel effectively dissolved itself as improperly convened. The dissolution of a three judge panel is effectively the same as a single district judge's denial of a motion to convene a three judge panel and an appeal should be taken to the United States Court of Appeals for the Seventh Circuit.

In the alternative, even if this appeal is properly before this Court, the constitutional questions presented by the Applicants are not substantial. The "continued absence" Regulation at the issue in this case is not unconstitutional on its face. It does not classify welfare claimants into two groups, those who have been separated from their husbands for less than six months and those who have been separated from their husbands for more than six months. The six month period of the Regulation is a guideline only. Effectively, the Regulation classifies welfare claimants into two groups, those whose separation from their spouses is actual and bona fide and those whose separation is not, clearly a constitutional classification. Furthermore, the Regulation is not unconstitutionally administered. Applicants' claim that the Indiana Welfare Department will not waive the six month period of the Regulation unless the welfare applicant applies for a

divorce or legal separation. The court below conducted an evidentiary hearing on just that issue. The burden was on the Applicants to prove that the alleged practice existed. They failed to sustain this burden in the district court. In this Court, the burden is on the Applicants to show that the district court erred in this regard. This the Applicants have failed to do. Hence, the decision of the district court should be affirmed.

In the alternative, the court below properly dismissed for the Applicants' failure to exhaust administrative remedies, even if a substantial federal question might have been presented. This Court's decision in *Damico v. California,* 389 U.S. 416 (1967), should be reconsidered in light of the Indiana administrative scheme for reviewing welfare claims and in view of this Court's decision in *Goldberg v. Kelly,* 397 U.S. 254 (1970). First, the State administrative remedies are neither inadequate nor their pursuit futile. The law in Indiana provides an AFDC applicant, pursuing an administrative appeal, with the full discovery rights of a civil litigant, discovery rights which are more extensive than those provided a civil litigant in the federal courts. The fact finding forum which the Applicants sought in the federal court was already available to them before the welfare department. Secondly, having decided that constitutional procedural due process rights attach to administrative hearings before the welfare department in *Goldberg v. Kelly, supra,* the Applicants in this case should be required to pursue their remedies before the welfare department. Therefore, this Court should affirm the judgment of the district court dismissing this action for the Applicants' failure to exhaust their administrative remedies.

ARGUMENT

I

EVEN IF APPLICANTS PRESENTED A SUBSTANTIAL FEDERAL QUESTION BELOW, THIS COURT DOES NOT HAVE JURISDICTION OF THIS APPEAL BECAUSE WHEN THE THREE JUDGE PANEL BELOW DISMISSED THIS CAUSE FOR WANT OF FEDERAL JURISDICTION, IT EFFECTIVELY DISSOLVED ITSELF AS IMPROPERLY CONVENED AND APPEAL LIES ONLY TO THE COURT OF APPEALS.

To date, the participants in this appeal have ignored the significance of the three judge district court's dismissal for want of federal jurisdiction. What is raised is a question of this Court's jurisdiction to hear this appeal.

This Court's jurisdiction to hear this appeal may be challenged at any time, either at the suggestion of the appellee, *Flast v. Cohen*, 392 U.S. 83, 88, n.2 (1968), *United States v. Griffin*, 303 U.S. 226, 228, 229 (1938), or by this Court on its own motion, *Stratton v. St. Louis*, 282 U.S. 10 (1930). Turning to the procedure adopted by the court below, rather than conduct a hearing on the substantiality of the federal claims presented by Applicants, the single district judge before whom the motion to convene a three judge panel was pending granted the motion and a three judge panel was in fact convened. After convening, the three judge panel conducted a hearing for the purpose of determining whether the Applicants presented a substantial federal claim. After receiving all the evidence,

the three judge panel concluded that the Applicants had not presented a substantial federal question and that it was without jurisdiction. (A. 212). *See E.g., McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178 (1936). Rather than dissolving itself and remanding the case to the single district court judge, before whom the claim was pending, for disposition, the three judge panel in fact ordered the cause dismissed.

The only proper measure to take when it concluded that no substantial federal question was presented was for the three judge panel to dissolve itself, leaving the cause to be disposed of by the single judge before whom the cause was initially pending, See, *E.g. Mengelkoch v. Industrial Welfare Commission,* 284 F. Supp. 950 (dissolving three judge panel), 284 F. Supp. 956 (abstaining) (C.D. Calif. 1968); *Marcello v. Kennedy,* 194 F. Supp. 748 (dissolving three judge panel), 194 F. Supp. 750 (single judge granting Motion for Summary Judgment) (D.C. D.C. 1961); *But see, California Water Co. v. Redding,* 304 U.S. 252 (1938). Clearly, the effect of dismissing this cause for want of federal jurisdiction was to dissolve the three judge panel. Even though the three judge panel dismissed the cause, on appeal, the cause should stand as if dismissed by a single district judge. The participation of the circuit judge and the additional district judge in the motion to dismiss is superflous. *Perez v. Ledesma,* U.S., 91 S.Ct. 674, 677-678 (1971); *Wilson v. Port Lavaca,* 391, U.S. 352 (1968). An appeal from the decision of a single district judge denying a motion to convene a three judge panel for want of a substantial federal question is to the Court of Appeals, in this case, the United States Court of Appeals for the Seventh Circuit. *German v. South Carolina State Ports Authority,* 295 F.2d 491, 493-494 (4th

Cir. 1961) (authorities cited). Since the decision of the three judge panel was that it was without jurisdiction under 28 U.S.C. §2281, this Court is without jurisdiction under 28 U.S.C. §1253 and the appeal should have been to the United States Court of Appeals for the Seventh Circuit. *Perez v. Ledesma, supra; Mengelkoch v. Industrial Welfare Commission,* 393 U.S. 83 (1968); *Wilson v. Port Lavaca, supra.*

That this Court is without jurisdiction of this appeal is further borne out by an analysis of 28 U.S.C. §1253 itself. Under §1253, an appeal to this Corut is from an ". . . *order* granting or denying . . . an interlocutory or permanent injunction . . ." An inspection of the lower court's judgment in this case discloses that no such order was entered. (A. 211-212). Hence Applicants may not avail themselves of the benefits of §1253.

Therefore, this appeal should be dismissed at the suggestion of the SDPW or this Court's own motion.

II

IN THE ALTERNATIVE, APPLICANTS HAVE NOT PRESENTED A SUBSTANTIAL FEDERAL QUESTION.

The Applicants claim that the Regulation conflicts with the Social Security Act and with the Constitution. Assuming *arguendo,* that this Court has jurisdiction of this appeal, only the alleged constitutional violations are before it. If a substantial federal question was not presented to the three judge panel below, then it properly dismissed (or dissolved) for want of jurisdiction. An alleged constitutional violation is a substantial federal

question which requires that a three judge panel be convened, but a conflict with the Social Security Act is not. *Swift & Co. v. Wickam,* 382 U.S. 111 (1965); *Case v. Bowles,* 327 U.S. 92, 97 (1946); *Ex parte Buder,* 271 U.S. 461 (1926); Cf. *Florida Lime Growers Association v. Jacobsen,* 362 U.S. 73, 82 (1960).

The question posed by the Applicants is whether the three judge panel had jurisdiction to hear the Applicants' claims. The alleged statutory conflict is reached only if the constitutional question is substantial. *Swift & Co. v. Wickam, supra.* Hence, this Court need only concern itself with whether the Applicants' constitutional claims present a substantial federal question.

A three judge panel is properly convened only if the constitutional question raised is substantial. *Flast v. Cohen,* 392 U.S. 83, 91, n. 4 (1968). *Ex Parte Poresky,* 290 U.S. 30 (1933). That a federal question is insubstantial may appear on its face from an examination of the Applicants' claims. *Swift & Co., v. Wickam, supra; Zemel v. Rusk,* 381 U.S. 1, 6 (1965); *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255 (1938).

In their complaint, Applicants alleged that the Regulation violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States because it invidiously and irrationally classifies the children's parents into two groups, one being parents of children who have been separated for less than six months and the other being parents of children who have been separated for more than six months. Morever, Applicants claim, the classification is arbitrary and without a rational relationship to the needs of the parents and their children. Furthermore, Applicants claim that the Regulation as administered by the welfare department violates the Due

Process and Equal Protection Clauses of the Fourteenth Amendment and the right of privacy as guaranteed by the Fourth Amendment because the welfare department allegedly demands that an applicant for assistance obtain a divorce or legal separation as a condition precedent to obtaining welfare assistance in less than the first six months after they have separated from their husbands.

The Applicants' arguments are based on a misconstruction of the Regulation. When the Regulation is scrutnized, the Applicants' claims evaporate. The Regulation on its face designates the six month period as a guideline only. In making their argument, the Applicants ignore the exception to the six month rule. The Regulation effectively provides, on its face, that the six month rule does not apply when it is determined that the need for assistance exists and that the parent's absence is actual and bona fide. The authorities upon which the Applicants rely to support their claim of substantiality on this point all involve statutes or regulations creating non-rebuttable presumptions. *See, Shapiro v. Thompson,* 394 U.S. 618 (1969); *see also, Doe v. Hursh,* 2 Pov. L. Rep. ¶11, 753 (D. Minn. 1970); *Damico v. California,* 2 Pov. L. Rep. ¶10, 478 (N.D. Calif. 1969). On its face, the six month period of the Regulation is a guideline only. At worst, it provides for a rebuttable presumption as to what constitutes a continued absence. It cannot be said that the Regulation on its face precludes AFDC assistance in all instances where the parents have been separated for less than six months. Clearly, an undetermined number of applicants may obtain assistance even if separated less than six months upon a showing of exceptional circumstances and of an actual and bona fide separation. Moreover, it cannot be said that the Regulation on its face creates two groups of needy children,

those whose parents have been separated for less than six months and those whose parents have been separated for more than six months. The two classes created by the statute are those whose parents have actually separated and those who have not. Thus, this claim of the Applicants does not present a substantial federal question.

The next branch of the Applicants' argument is based on the way on which they claim the Regulation is administered. Applicants claim that the welfare department administers the Regulation by requiring applicants who have been separated from their spouses for less than six months to file for a divorce or legal separation as a condition precedent to obtaining a waiver of the six months rule and that assistance can never be obtained in less than six months by an applicant who has not filed for a divorce or legal separation. Applicants argue that this alleged practice of the welfare department violates the Applicants' rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the right of privacy guaranteed by the Fourth Amendment. This claim of the Applicants must be considered in light of the proceedings and disposition below.

The lower court conducted an evidentiary hearing on the Applicants' claims. The evidence regarding the alleged practice of the welfare department requiring an applicant to file for a divorce or legal separation was in conflict. The testimony of the Applicants themselves conflicted as did the testimony of some of the Applicants with the testimony adduced by the welfare department. For instance, of witnesses for the Applicants, Tanner began receiving AFDC within a month of her application for assistance (she had filed for divorce before she ever applied for

AFDC) (A. 73, 75); and Watkins, received her first AFDC check within a month of her application. (A. 82, 84), even though she never filed for a divorce or separation. Of the Applicants themselves, Enoch began receiving AFDC assistance within two months of her application (A. 150-155), although she had never obtained a divorce or separation (A. 144); and Hall began receiving AFDC assistance within three months of her application (A. 163), without filing for a divorce or separation. (A. 160, 163). Shortly after Applicants Laverne Carter and Steele separated from their husbands, they reunited and were living together on the day of the evidentiary hearing. (A., Carter, 134; Steele, 135). Applicants, Bowman, Enoch and Hall and witnesses for the Applicants, Tanner, Watkins and Luke were receiving AFDC at the time of the hearing below. And finally, Davis, a witness for the Applicants was employed at a local hospital at a bi-weekly income of $135.00 to $160.00, at the time of the hearing below. (A. 96). Testimony for the welfare department showed that filing for or obtaining divorces and separations are not required as a condition precedent to obtaining a waiver of the continued absence Regulation. Both Blankenbackler (A. 168-170) and Smith (A. 170-174) began receiving AFDC assistance within a month after they applied, without that first mention of filing for a divorce or separation. The director and personnel of the Marion County Department of Public Welfare also testified that filing for or obtaining a divorce or separation is not a condition precedent to obtaining a waiver of the Regulation (A. McGruder, 50, 54; Carver, 176-177; Hartzlar, 187; Stanton, 191), and that the six month period of the Regulation is regularly waived. (A. 52-55, 58, 176, 187, 192).

The Applicants, at p. 18 of their brief, say that:

> ". . . Claimants submit that a full trial of this case is required to determine this factual issue [the welfare department's practices under the Regulation], but that, for the purpose of determining if substantial legal questions are presented by claimant's allegation, such policy and practice must be deemed to exist."

This is a clear mis-statement of the law and well illustrates the unsoundness of the position the Applicants have taken in this Court on appeal. The Applicants claim that the alleged practices of the welfare department must be deemed to exist for the purposes of this appeal. The alleged practices of the welfare department go to the jurisdiction of the three judge panel to hear this case, that is to say, whether Applicants have presented a substantial federal question. Jurisdiction is never deemed to exist. The burden of proving jurisdiction in the district court lay with the Applicants. The burden of showing this Court that the three judge panel had jurisdiction to consider the Applicants' claims is with the Applicants. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). The Applicants have wholly failed to sustain that burden in either court. The three judge panel below conducted an evidentiary hearing for the purpose of determining whether the facts supported the Applicants' allegations and found that they did not. *See E.g., McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). Since it was the function of the district court to resolve conflicts in the testimony and since the district court concluded that the Applicants had not presented a substantial federal question (A. 212), it must be inferred that the lower court resolved all conflicts in the evidence in favor of the welfare department. The testimony of the welfare department

clearly showed that filing for a divorce or legal separation was not a condition precedent to filing an application for assistance or obtaining assistance in less than the six months prescribed by the rule. Having failed to convince the lower court of their claims, the Applicants cannot be heard now to request this Court to resolve the conflicts in the evidence or to request this Court to remand the case to the district court to re-hear the evidence already heard. Having failed to carry the day in the district court, the Applicants can hardly be heard again on their claim that the Indiana Welfare Department requires an applicant to file for a divorce or legal separation under the Regulation. Absent this factual basis, the Applicants' Fourth and Fourteenth Amendment arguments must fall. Absent a factual basis for their claim, applicants have presented neither the district court nor this Court with a substantial federal question regarding the welfare department's practices under the Regulation.

Although the merits of the Applicants' claims regarding the validity of the Regulation are not before the court in this appeal, it is only fitting that this case be considered in light of this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970). The impact of *Goldberg* cannot be ignored in resolving the issues before this Court in this appeal. In *Goldberg*, this Court decided that the full panoply of constitutional procedural due process applied to a state welfare department's decision to terminate welfare benefits. The *Goldberg* decision places a heavy burden on the administration of AFDC assistance. The ramifications of *Goldberg* are awesome. See the dissents of Chief Justice Burger, at p. 280, Justice Black, at p. 271, and Justice Stewart, at p. 385 of *Goldberg*. In view of the costly and time consuming procedures this Court has required

of the States in order to terminate benefits, it is only reasonable that the dispensers of AFDC assistance must ensure eligibility before granting AFDC assistance in the first instance. The Indiana Regulation at issue here is intended to be one of those assurances. It is not an unreasonable method of ensuring an applicant's eligibility. In considering the Regulation involved in this case it would be well for this Court to regard it in light of its decision in *Goldberg*.

In conclusion, the SDPW submits that the district court properly dismissed on the Applicants' failure to present a substantial federal question.

III

IN THE ALTERNATIVE, THE LOWER COURT PROPERLY ORDERED APPLICANTS' CAUSE DISMISSED FOR A FAILURE OF THE APPLICANTS TO EXHAUST THEIR STATE ADMINISTRATIVE REMEDIES.

The Indiana statutory and regulatory scheme provides every claimant with a right to appeal any decision of the County Welfare Department denying an application for assistance or modifying or revoking the amount of assistance previously granted, to the State Department of Public Welfare. Burns' (1964 Repl.) §52-1246. This is buttressed by Regulation 2-113 of the Indiana State Board of Public Welfare detailing the procedures to be followed. Burns' Rules and Regulations (1970 Supp.) (52-1211)-1. (The Statute (p. 3a) and Regulations (pp. 4a-8a) are set out in full in the Appendix to Applicants' Brief.) Regulation 2-113 further provides that decisions of the SDPW may be appealed to the State Board of Public Welfare. Reg. 2-113(f).

The uncontroverted evidence heard by the district court disclosed that not one of the Applicants pursued an appeal to the SDPW or to the State Board of Public Welfare. Hence, the district court found that:

> "Under Indiana law each claimant is provided with a right to appeal any decision made by the case workers or supervisors at the county level, whether it be a denial of the right to file an application, a denial of assistance after the filing of an application, or dissatisfaction with the amount of the grant. The appeal procedures provide a right to have the decision reviewed by the State Department of Public Welfare and if still dissatisfied with the decision, a second appeal may be had to the State Board of Public Welfare. None of the plaintiffs testified that they appealed the county decision. Only one of the witnesses, Toni Davis, testified that she appealed to the State Department of Public Welfare, but not to the State Board of Public Welfare. Defendant Stanton, Director of the County Department of Public Welfare, testified the file does not record any appeal taken by any of the plaintiffs." (A. 211-212).

On the basis of its findings, the district court concluded that:

> "We therefore conclude that none of the plaintiffs appealed the various decisions made at the office level of the County Department. Having so failed to exhaust the administrative appeal procedures provided, we find a failure on the part of the plaintiffs to exhaust their administrative remedies through the state administrative procedures." (A. 212).

Applicants argue that they cannot be required to exhaust state administrative remedies since their action was under 42 U.S.C. §1983 and since the state administrative remedies are inadequate. For authority, Applicants rely

upon the cases of *Monroe v. Pape,* 365 U.S. 167 (1961); *McNeese v. Board of Education,* 373 U.S. 668 (1963); *Damico v. California,* 389 U.S. 416 (1967) *(Per Curiam); King v. Smith,* 392 U.S. 309, 312, n. 4 (1968); and *Houghton v. Shafer,* 392 U.S. 639 (1968) *(Per Curiam). Contra, Metcalf v. Swank,* 305 F. Supp. 785 (N.D. Ill. 1969).

Dismissal for failure to exhaust is an abstention doctrine. It implies that the court has jurisdiction (in this case that substantial federal questions are presented) but that the district court will stay its hand, for the time being, in the interest of state-federal relationships. If substantial federal questions have been presented then this Court should have reversed summarily as it did in *Houghton v. Shafer, supra,* and *Damico v. California, supra.* That this Court noted probable jurisdiction in this case rather than summarily reversing the decision of the district court as was done in *Damico v. California, supra,* and *Houghton v. Shafer, supra,* suggests that this Court may question the soundness of its decisions in the cases upon which Applicants rely for reversal of the district court.

The question posed is whether dissatisfied welfare applicants should be permitted to flagrantly circumvent established, orderly, state administrative remedies before their cases are heard in the federal courts. In a long line of decisions prior to this Court's decision in *Monroe v. Pape, supra,* the law was well established that state administrative remedies should be exhausted before resort was had to the federal courts for relief. *Harrison v. N.A.A.C.P.,* 360 U.S. 167 (1959); *Martin v. Creasy,* 360 U.S. 219 (1959); *Stefanelli v. Minard,* 342 U.S. 117 (1951); *Alabama Public Service Commission v. Southern Railway Co.,* 341 U.S. 341 (1951); *Burford v. Sun Oil Co.,*

319 U.S. 315 (1943). The SDPW submits that it would be well for this Court to reconsider its position in *Houghton, King, Damico, McNeese* and *Monroe* as applied to cases of the sort before it. See Justice Harlan's dissent in *Damico v. California, supra,* at pp. 417-420. That the *Damico* line of decisions is of recent vintage would not preclude this Court from reviewing its soundness. *See, Swift & Co. v. Wickham,* 382 U.S. 111 (1965), over-ruling, as unsound, *Kesler v. Department of Public Safety,* 369 U.S. 153 (1962), decided less than three years before *Swift & CO.*

All decisions of the county department affecting an applicant for or recipient of assistance are subject to review by the SDPW. Burns' §52-1246; Reg. 2-113(a). A decision of the SDPW may be further appealed to the State Board of Public Welfare. Reg. 2-113(f). At every stage of the administrative process, the applicant for or recipient of assistance must be promptly notified of any decision regarding assistance, and must be notified of her right to appeal to the next level. Reg. 2-113(a) and (f). Hearings are informal. The applicant may be represented in person or by counsel. The applicant or her representative has the right to present evidence, cross-examine opposing witnesses and to examine all documents and records used at the hearing. Reg. 2-113(d). Parenthetically, under the Indiana Rules of Procedure governing civil actions generally, a party to welfare administrative proceedings may avail herself of the full panoply of discovery tools available to a litigant in any action in any court in the State. Rule TR. 28(F), Indiana Rules of Procedure. Rule TR. 28(F) provides that "[w]henever a hearing before an administrative agency is required, parties shall be entitled to all the discovery pro-

visions. . ." of the Indiana Rules of Civil Procedure governing trial actions. Furthermore, the Rule provides that ". . . [p]rotective and enforcement orders shall be issued by a court of the county where discovery is being made or where the hearing is to be held . . . ."

The Indiana discovery rules are at least as broad, and probably more so, as the discovery provisions of the Federal Rules of Civil Procedure. The SDPW knows of no other State which affords the full discovery rights of a civil litigant to parties proceeding before an administrative agency. At all levels, prompt action on the part of the welfare department is required. Significantly, all corrective action is fully retroactive. Reg. 2-113 (c).

Applicants, at pages 25-27 of their brief, argue that exhaustion is not required where the administrative remedy is inadequate or futile. The Applicants attack on the state administrative procedures, governing welfare appeals, is manifold, myopic, misconceived and without merit. Whether the department would declare one of its regulations unconstitutional or invalid adds nothing to this case. Applicants ignore the fact that they have challenged certain practices under the Regulation in question in this case which they claim are not authorized by the Regulation. Whether the practices to which they advert exist or are condoned or approved by the SDPW are matters which can best be resolved or determined at the State Department or State Board level. For instance, since all the Applicants neglected to appeal the County determinations to the State Department and the State Board, there is no sound basis for determining whether the practice alleged does in fact exist or whether it is condoned or approved at the State level. Furthermore, if challenges to the validity of its Regulations are made during the process of administrative appeals within the agency, the agency

does have an opportunity in which to take corrective action.

That all of four appeals were taken from determinations of the Marion County Department of Public Welfare in the preceeding year to the SDPW and that the county decisions were sustained, shows no more than that few appeals are taken. Certainly none of the Applicants took appeals. The Applicants' additional allegations of procedural deficiencies in the administrative process merit no attention. The procedures adopted by the welfare department are more than adequate. *See Metcalf v. Swank,* 305 F. Supp. 785 (N.D. Ill. 1969).

To support their argument that they should not be required to pursue their administrative remedies before the welfare department, the Applicants rely heavily upon a note appearing in the Columbia Law Review. Note, *Federal Judicial Review of State Welfare Practices,* 67 Colum. L. Rev. 84 (1967). The note is a broad indictment of administrative remedies before the welfare departments of the various states. It is so broad as to be of no use in analyzing the efficacy of administrative review before the Indiana Welfare Department. The Note neither purports to, nor in fact does it treat the Indiana scheme.

Turning to the Indiana scheme, enough cannot be said of the significance of the availability of full discovery rights in the administrative proceeding. It provides for all the discovery tools available in the federal district court. Nowhere, do the Applicants display cognizance of or acknowledge the availability of discovery procedures in the Indiana Administrative appellate structure. *In short, the fact finding forum the Applicants sought in the federal district court was already available to them before the Indiana Welfare Department.*

In addition to the reasons usually cited for the exhaustion doctrine, the exhaustion of administrative remedies could have served two additional important functions, in this case. First, it places the issues squarely before the agency and gives it an opportunity to take corrective action. Secondly, it serves to develop a record upon which a federal court can make its determination without the necessity for further proceedings there. Let us turn to the facts of this case to determine how requiring the Applicants to exhaust their administrative remedies could have avoided the present action or, alternatively, conserved the valuable judicial time of the federal courts. First of all, let us assume that it is the practice of certain case workers attached to the Marion County Department of Public Welfare to require a recently separated applicant to file for a divorce or legal separation as a condition precedent to obtaining assistance or that it is the policy of the County Department to require a divorce or legal separation under these circumstances. Had Applicants pursued their administrative remedies, the SDPW and the State Board of Public Welfare would have had an opportunity to determine whether in fact such a practice existed or that such a practice, if it existed, was violative of the Regulation in question and taken corrective action. With these Applicants we will never know what was the position of the SDPW because these Applicants never appealed to the SDPW. Significantly, it is highly questionable that Applicants can ever satisfactorily prove that the practice they claim exists does in fact exist *statewide*, a condition necessary to invoke the provisions of 28 U.S.C. §2281, absent some affirmative action by the SDPW itself. Only an appeal to the SDPW would satisfactorily dispose of the issue.

If the Applicants had exhausted their available administrative remedies, the district court action might have been unnecessary or the district court could have made its determination on the basis of the record made in Applicant's appeal through the administrative hierarchy. The district court has already conducted a lengthy evidentiary hearing. If this Court reverses and remands, in all likelihood, we can expect further proceedings in the district court. There is nothing in this record to show with any degree of probability that the sole reason Applicants were denied assistance was their alleged claim that they had not filed for a divorce or legal separation. It is the Applicants' burden to show that the sole reason for a denial of assistance to them was their failure to file for or obtain a divorce or separation. This record obviously does not disclose that Applicants' sustained that burden. However, had the Applicants exhausted their administrative remedies, that record could have been obtained and attached to their complaint as an exhibit, had it been necessary to file a suit in the federal court and the federal court could have disposed of the case on the pleadings, a considerable saving of judicial time.

There is a touch of irony to the Applicants' arguments that the administrative remedies provided by the State of Indiana are inadequate and that the exhaustion is a futile gesture. Not having tried available state administrative remedies, the Applicants can hardly be heard to complain that the remedies are inadequate or that their pursuit would be futile. All of the Applicants were notified in writing of their right to appeal the county decision. All of the Applicants testified that they understood that they had a right to appeal the county decision. All of the Applicants were represented by attorneys of the local

Legal Services Organization. Yet not one of the Applicants pursued an appeal. Significantly, several of the Applicants expressed an interest in appealing the county decision. (A., Bowman, 123-125; Carter, 132-133; Steele, 142-143). At least two of the Applicants testified to facts from which it could be inferred reasonably that they believed the district court action to be the appeal to which they were informed they had a right when assistance was denied by the county department. (A., Bowman, 123-125; Steele, 142-143). And finally, the SDPW is somewhat troubled by the haste with which and circumstances under which the action below was initiated. Apparently, at least one of the Applicants was not denied welfare assistance by the county until some time after the district action was initiated. (A., Steele, 142-143, 144). Another Applicant had been denied welfare assistance for a child not in her custody at the time this action was initiated in the lower court. (A., Enoch, 155). And then there is the remark of counsel for the Applicants that "... she [plaintiff, Enoch] really doesn't have anything to do with the lawsuit, it's the lawyers who filed it." (A. 152).

And finally, no consideration of the exhaustion issue would be complete without including some mention of this Court's decision in *Goldberg v. Kelly,* 397 U.S. 254 (1970). It is ironic indeed, that this Court decided in *Goldberg* that the full panoply of constitutional due process must be observed in state administrative proceedings to terminate welfare assistance, while, on the other hand, as a result of *Damico, supra,* this Court permits welfare applicants to flagrantly circumvent the very administrative procedures that this Court decided were required in *Goldberg.* Having decided that certain constitutional protections attached to administrative welfare hearings, this

Court should now compel AFDC applicants to pursue and exhaust those administrative procedures.[1]

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1. The Applicants present a detailed argument in Parts III and IV of their brief that the district court had jurisdiction of the Applicants' claim under 42 U.S.C. §1983 and 28 U.S.C. §§1343(3) and (4). The SDPW presents no arguments in this brief directed to these contentions of the Applicants. Given the SDPW's view of proceedings in the court below and the posture of this case on appeal, the issue of the district court's jurisdiction, a single judge presiding, to resolve an alleged conflict between the Indiana Regulation and the Social Security Act is not before the court in this appeal and would be better left for the United States Court of Appeals for the Seventh Circuit. See, *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). The jurisdictional issue and a related exhaustion of administrative remedies issue (HEW) should be left for another day. *See, Lewis v. Martin*, 397 U.S. 552 (1970), Justice Black dissenting, at pp. 560-563.

CONCLUSION

In the alternative, this Court should dismiss this appeal for want of jurisdiction, or this Court should dismiss and remand with leave for Applicants to pursue their appellate remedies in United States Court of Appeals for the Seventh Circuit or this Court should affirm the judgment of the district court.

Respectfully submitted,

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